UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

DEPARTMENT OF THE AIR FORCE AIR FORCE MATERIEL COMMAND WARNER ROBINS AIR LOGISTICS CENTER ROBINS AIR FORCE BASE, GEORGIA Respondent	Case Nos. AT-CA-80670 AT-CA-80672 AT-CA-80734 AT-CA-80584
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 987 Charging Party	

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to pursuant to 5 C.F.R. § 2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.40-2423.41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **APRIL 19, 1999**, and addressed to:

Federal Labor Relations Authority
Office of Case Control
607 14th Street, NW., Suite 415
Washington, DC 20424-0001

ELI NASH, JR.
Administrative Law Judge

Dated: March 18, 1999
Washington, DC

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

MEMORANDUM DATE: March 18, 1999

TO: THE FEDERAL LABOR RELATIONS AUTHORITY

FROM: ELI NASH, JR.
ADMINISTRATIVE LAW JUDGE

SUBJECT: DEPARTMENT OF THE AIR FORCE
AIR FORCE MATERIEL COMMAND
WARNER ROBINS AIR LOGISTICS CENTER
ROBINS AIR FORCE BASE, GEORGIA

Respondent

and Case Nos. AT-CA-80670
AT-CA-80672
AT-CA-80734
AT-CA-80584

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES
LOCAL 987

Charging Party

Pursuant to section 2423.34(b) of the Rules and Regulations, 5 C.F.R. § 2423.34(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the transmittal form sent to the parties, and the service sheet. Also enclosed are the transcript, exhibits and briefs filed by the parties.

Enclosures

FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges OALJ

99-20

WASHINGTON, D.C.

DEPARTMENT OF THE AIR FORCE AIR FORCE MATERIEL COMMAND WARNER ROBINS AIR LOGISTICS CENTER ROBINS AIR FORCE BASE, GEORGIA Respondent	Case Nos. AT-CA-80670 AT-CA-80672 AT-CA-80734 AT-CA-80584
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 987 Charging Party	

Brent Hudspeth and
Ruth Pippin-Dow
For the General Counsel

C.R. Swint, Jr.
For the Respondent

Before: Eli Nash, Jr.
Administrative Law Judge

DECISION

Statement of the Case

This case arose under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. § 7101, et seq.

On May 12 and June 29, 1998,[1] respectively the American Federation of Government Employees, Local 987 (herein called the Union) filed unfair labor practice charges against the Department of the Air Force, Air Force Material Command, Warner Robins Air Logistics Center, Robins Air Force Base Georgia (herein called the Respondent). Thereafter on

[1] All dates are 1998, unless otherwise noted.

August 31, the Regional Director, of the Atlanta Region, Federal Labor Relations Authority, issued a Complaint and Notice of Hearing alleging that the Respondent violated section 7116(a)(1), (2) and (4) of the Federal Service Labor-Management Relations Statute (the Statue), as amended by removing an employee from his position as program manager in retaliation for his filing numerous grievances and unfair labor practice charges. Subsequently, on September 30, the Regional Director, of the Atlanta Regional Office, issued a Consolidated Complaint and Notice of Hearing alleging that the Respondent violated section 7116(a)(1), (2), (4) and (5) of the Statute by removing the same employee a program manager without providing the Union with notice and the opportunity to bargain over the removal; and considering the employees protected activity in his performance evaluation; and by making statements that violated section 7116(a)(1) of the Statute.

A hearing on the Complaint was held in Macon, Georgia, at which time all parties were afforded full opportunity to adduce evidence, call, examine and cross-examine witnesses and argue orally. Briefs were filed by both the Respondent and the General Counsel and have been carefully considered.

Upon the entire record in this case, my observation of the witnesses and their demeanor, and from my evaluation of the evidence I make the following:

Findings of Fact

A. Background and Events Prior to April 30

The LU Product Directorate (herein called LU) consists of approximately 300 employees and is responsible for the acquisition and sustainment of all special operations aircraft and helicopters. LU is located at both Robins AFB and Wright- Patterson AFB. The LU is headed by Colonel Henry Mason and is subdivided into Integrated Product Teams (IPTs) to deal with specific weapon systems and subsystems. These teams are made up of employees with different skills as needed. Among these skills are about 30 or 40 program managers. The LU serves another organization known as Air Force Special Operations Command (AFSOC) which funds the LU including the payment of its employees' salaries.

AFSOC is located at Hurlbut Field, Florida, and is not organizationally a part of the Respondent's facility at Robins AFB, Georgia. Colonel James Niedbaldski is the Director of Logistics for AFSOC. Mason who heads LU considers AFSOC to be his "customer" and Colonel Niedbaldski to be "very influential" to him because ". . . we're basically here to do what he needs done in the way he needs

it done." The service provided to AFSOC by LU could be obtained from alternate sources outside of LU at the discretion of AFSOC. In short, LU's exists only to support AFSOC in the maintenance of its weapon systems and if it does not do so adequately (in the eyes of AFSOC officials such as Niedbaldski), this service could be obtained elsewhere. If this occurred, LU would, of course, have no continued reason for existence or funding.

The alleged discriminatee in this case C.R. (Rick) Benson, has worked for Respondent LU for approximately 25 years, the last 18-20 years as a program manager. The program manager is the point of contact for the program and works closely with the customer on a daily basis. Once AFSOC identifies a need, the program manager evaluates the situation and determines the best method of addressing the needs identified by ASFOC. AFSOC, however, must identify its requirements on a particular program, as is dictated by law. Without written requirements from the customer, neither the program nor the program manager can perform their duties. Even with the timely submission of written requirements, it is usual for a project to take several years to complete. As a program manager, Benson can manage as many as 25-30 programs for AFSOC. His work for AFSOC is basically done with the same offices and same personnel. Benson is considered to be a professional and effective program manager with experience in rescuing troubled programs.

Benson's performance as a program manager was rated as excellent by his latest superiors. While Benson received a perfect numerical rating of 81 on a performance appraisal as a supervisor in 1995 under approving official, Colonel Stanley T. Bishop his ratings as a program manager in 1996, 1997 and 1998 (the rating alleged herein as discriminatory) were approved by Mason. The latest three appraisals carried a numerical value of 75. His overall rating in each case was excellent. Although the appraisals indicate that he was eligible for a performance award, Benson speculated in testimony that "there was no way" he could get a performance award with that score.

Benson is a union member who served in several capacities as a union steward. From 1996 through 1998, Benson was the union representative assigned to LU, which is a subcomponent of the LU. His protected activity in LU was far-reaching. It involved the filing of grievances, unfair labor practice charges, participation in investigations of unfair labor practice charges and testifying before the Authority. Respondent's knowledge of Benson's protected activity is uncontested. Among those named in grievances and unfair labor practice charges were Mason and IPT Leader

Larry Layfield, Benson's first-line supervisor, who are again named in theses consolidated matters.

In 1995, Benson as already noted, occupied a supervisory position but was removed from that position because of his inability to work in harmony with others (AFSOC personnel) and because he allegedly "botched" a briefing to a general officer. This decision was made by Bishop, who was Mason's predecessor in office and occurred in a year in which Benson received an "81" a perfect numerical score.

Since then, Benson has been a program manager, GS-12 in LU. Around April or May of 1997, Benson became the program manager for the APQ-158 system. Around November 1997, after a heated E-mail argument between Benson and his then supervisor, Major Wiggs, Benson left the APQ-158 system. Benson's testimony as to why he left the APQ-158 system is contradictory. Thus, at different times he testified that he left voluntarily only to say at another time he was fired. Wiggs also left his supervisory role around the same time and was replaced by Larry Layfield in November 1997. Apparently a shortage of personnel required Layfield to ask Benson to again assume the program manager's duties for the APQ-158 system in February. Benson testified that when Layfield came to him about the APQ-158 system, although reluctant to return to that system, he told Layfield, "I want us to put our union stuff separate from work." He also said that he told Layfield, "I'll do whatever I can to get a good appraisal." He meant a perfect score of 81. According to Benson, Layfield "did agree to work with him, guide him and in effect help him achieve the 81." Benson did not indicate that he expected such a score in 1998. Layfield does not recall such a conversation. He was candid in stating that everyone wanted a perfect score, indicating that he probably was not hearing this for the first time and that it was so commonplace that it would not leave an impression on him. I credit Layfield.

The APQ-158 system was and had been a "problem child to support," but Benson in 1998, indeed came up with a plan to remedy its deficiencies. It is not contested that Benson's plan for the APQ-158 system in early 1998 was well received. Mason in fact thought it was ". . . excellent work" and encouraged him to pursue it. A memorandum of April 13, from Colonel John S. Stephens, Director, Plan, Programs & Acquisitions Management, however, states that the "current situation of the APQ-158 is unacceptable, and AFSOC requires that changes be made to the support structure of this program." Benson's supervisor, Layfield responded on April 28, noting that under the plan Benson had set up, AFSOC could expect significant improvement, and observed

that at the March 12, briefing AFSOC endorsed and was committed to the "new approach." He also noted, that at the April 8, H-53 quarterly review misunderstanding and confusion of the requirements was evident. Layfield thus requested that the command requirements be provided. Layfield testified that he received the requirements on April 30 and that he gave the requirements to Benson that day, before the April 30, briefing at issue here.

After returning to the APQ-158 system in mid-February, it is uncontroverted that Benson angered some of the AFSOC personnel he dealt with. This charge was not new, as the record reveals that in the past, AFSOC personnel made similar accusations against Benson. In the particular situation in this case, an E-mail to Richard Tusai, the Avionics Branch Chief for Logistics for Sustainment of Avionic Systems, Benson referred to him as "Sgt. Tusai." This seems to have started a new round of problems for Benson with AFSOC. I credit Tusai based on my observation of his demeanor. Tusai testified that while he supported Benson's return to the APQ-158 system, the April 24, E-mail offended him as he felt Benson was "talking down to him." Tusai explained that he had retired from the Air Force as Chief Master Sergeant and he considered it an insult to be referred to as "Sergeant." Tusai's reaction when asked how he was offended was entirely natural for someone who has risen to the highest enlisted rank in the Air Force before returning. He insisted that he should have at least been called "Chief." Tusai also testified that, ". . . over ten years of working with Rick, it was Rick, Dick, Rick, Rick, and all of a sudden, when he decided that things weren't going his way, it now [I] became Sergeant." Tusai added that the E-mail confirmed what his functional managers and others in his office had complained about Benson's behavior toward them, but he explained that he had not experienced such behavior from Benson. Thus, it appears that Tusai's opinion of Benson changed considerably just before the April 30 briefing.

Tom Petrie, a witness for the General Counsel supports Tusai's assertion that the use of Sergeant when addressing a retired Chief Master Sergeant could be offensive. Petrie also stated that if he were addressed as Sergeant in an E-mail, he "would probably stop and wonder where they were coming from
. . . . " In contrast, Benson testified, he had commonly referred to Tusai as Sergeant over the years, and says that he refers to Tusai as Sergeant ". . . 50 percent of the time, 90 percent of the time. . . " Tusai's testimony clearly contradicted Benson's story that he commonly called him "Sergeant." Finally, if Benson had commonly called

Tusai "Sergeant" there is little doubt that Tusai would long ago have withdrawn his support for Benson, which support Tusai says he gave to Benson on the APQ-158 system. The content of the message to Tusai also might have been construed as offensive. In the message Benson stated that Tusai had ". . . no authority to hijack these assets, and I suggest you release them ASAP." Hardly a friendly communication between two colleagues. Rather, the tone and content could both have been insulting and demeaning to Tusai.

Additionally, Tusai testified that his AFSOC colleagues believed that Benson had been deliberately untruthful to them during one of his briefings about the status of the APQ-158 system. According to Tusai, Benson's conduct toward AFSOC personnel had become so offensive to them and his production so low, that they wanted him removed as the program manager. This led to complaints about Benson from Tusai being made to Niedbaldski, Tusai's supervisor or "O-6" who in turn discussed his concerns about Benson with Mason.

The record reveals that Benson and Tusai were also at odds about requirements for the APQ-158 system going into the April 30 briefing. Benson allegedly said that the customer did not know what they wanted and Tusai apparently became even more upset. Prior to the April 24, E-mail Benson conducted at least two briefings on the APQ-158 system which were seemingly uneventful. However, it is clear that since the requirements had not been given to Benson, these briefings were far from being the same as the April 30, briefing. Thus, Layfield as previously noted in his memorandum of April 28, stated that at the March 12, briefing of the program "a misunderstanding and confusion of the requirements was evident" and requested requirements be supplied to the program manager. There is no question that Benson was responsible for obtaining the "requirements" from the customer. Although it was undeniably his job, Benson's quest for the requirements undoubtably caused some hard feeling at AFSOC. It appears that AFSOC personnel were clearly on their way to making a case for Benson's removal from the APQ-158 system before the Program Management Review (herein called the PMR) briefing on April 30, took place. Whether AFSOC personnel's complaints about Benson had merit or not, it is clear that prior to the PMR, Tusai and Major Zack also from AFSOC complained to Niedbaldski about Benson's productivity as well as the way he embarrassed AFSOC personnel and recommended Benson's removal from the APQ-158 system.

Unlike LU the AFSOC personnel did not have to show a legitimate justification for their desire to remove Benson since none of his protected activity took place there. Whether correct or not their views about Benson was based on their perception of him as he performed his work for AFSOC.

B. The April 30 Briefing

On April 30, Benson was scheduled to give his briefing at the AFSOC, PMR held on April 29 through May 1, at Fort Walton Beach, Florida. This briefing was given for the high-ranking officers (Colonels) from the command. Although Benson, as already noted, briefed the APQ-158 system several times prior to April 30, the PMR was unquestionably special. It was a formal event at which more than 100 people would be present. All LU programs were to be briefed at this conference.

A plethora of witnesses, including Benson, testified about this briefing. There is no real issue here as to what occurred during Benson's briefing. The consensus of this testimony is certainly that Benson's briefing did not go over well. The recollection of some of these witnesses seems to be that Benson made a comment about his having been fired earlier as the program manager for the APQ-158 system. A comment which Benson does not deny. Some thought this comment was either inappropriate or counterproductive, embarrassing or of such a nature as to destroy confidence in Benson's capabilities. Others remembered the argument with Tusai after Benson said, he couldn't get any requirements out of AFSOC, repeating that he didn't know what the requirements were, which was tantamount in the view of some of the witnesses, to saying that he didn't know what to do on the program.

The evidence shows that Benson was in a difficult position when he went into the PMR on April 30. Again, whether AFSOC personnel were right or wrong about Benson's performance or behavior is immaterial. The record leaves no doubt about how AFSOC personnel, especially Tusai and Niedbaldski viewed Benson's performance following the April 24, E-mail. It also leaves little doubt that not only were they determined to have Benson removed from the APQ-158 system, but that Niedbaldski definitely had the ability, as the customer, to have Benson removed simply by giving the nod. Finally, and as previously noted, AFSOC's position on Benson had nothing to do with his protected activity. There is no question, on this record, that Niedbaldski could decide whom he wanted in any program manager's position servicing AFSOC.

It is not contested that Benson's plan for the APQ-158 system in early 1998 was well received. Tusai and Niedbaldski initially supported both Benson and his concept. I do believe, however, that based on their testimony that they were "waiting for" Benson and that they indeed "ambushed" him at this briefing. Niedbaldski whose testimony in my opinion, is particularly germane, says that in this briefing, he wanted Benson to provide factual details about the progress being made with the program and that he wasn't getting the answers he wanted. He also testified that Benson would beat around the bush in answering his questions claiming a lack of data and generally giving excuses for not producing. Niedbaldski recalls that one of Benson's excuses was that AFSOC was not sufficiently definitive in our requirements and that Tusai was rightfully upset about this comment. His view is consistent with many of the witnesses who attended the PMR. Benson acknowledged that there was a lot of "sniping" during the requirements part of his briefing and that the meeting "erupted" when talking about requirements Tusai became "upset" and "disagreeable." According to Mason, Benson said that he didn't have the requirements he needed, that AFSOC did not know what it wanted, and had not been doing its part in helping him. Benson's assessment may well have been correct.

AFSOC, of course, took exception and Mason felt it was inappropriate for Benson to be arguing with the customer in this forum. Niedbaldski asked Mason what he was going to do about the situation that was happening. At that point, Mason ended Benson's briefing. The above evidence establishes that, Benson, in his briefing made comments that some considered inappropriate and that he made remarks about the requirements for the program that invited anger and resentment from Tusai and concern from both Niedbaldski and Mason. Tusai testimony that he recommended Benson be removed from the program manager position before the briefing is confirmed by Niedbaldski.

Niedbaldski clearly stated that he did not get what he was expecting from Benson's briefing and that if Benson was encountering problems or prohibitions as the program manager he should brief it accurately, stating the new things that come up and tell how he is dealing with the program. Thus, according to Niedbaldski, the program manager should be saying, "this is how I'm dealing with it. Here's my work around procedures. This is my new milestone chart, this how I'm going to get you the capability. It might be two weeks later, but this is what I'm going to do to help that . . . ." Niedbaldski also testified that he talked to Mason about Benson. According to Niedbaldski, he not only

talked about the nonperformance but, warned Mason that he was going to look very critically at the performance at the PMR. About the PMR Niedbaldski says that he expected the following:

> to see some good milestones, and progress on this, and I wasn't sensing it, so I gave [Mason] a chance to intervene and prior to the PMR, and to look into the progress of this program and so during the PMR, during the briefing, I looked over at [Mason] a couple of times, not a lot, a couple times, and said [Mason], am I wrong here, I'm not hearing the answer to my question and I'm not getting the mile-I'm not hearing anything definitive here, I'm not seeing any progress.

Niedbaldski testified that, the program manager is the answer man, and that he was looking for facts or answers at this briefing. His view of the program manager's function is supported by Layfield. Niedbaldski also testified that it was not Tusai alone who was dissatisfied with Benson but stated as follows:

> Yeah. It wasn't only [Tusai]. It was a guy from XP, Major Zack, I believe is his name, that expressed some frustration and said you know, it would probably better if we had a different program manager on the program. Now, I think that's when I call Mason. I didn't suggest a different program manager to Mason because he does his own business with that. I did express my frustrations specifically with the facts.

Niedbaldski added that any caution, on his part, to change program managers was because he was striving for continuity in this program manager position since studies had revealed that the lack of continuity was a problem for the program. Niedbaldski detailed his conversation with Mason saying, the following:

> [Mason], you need to look into this, and I was not the supervisor to this gentleman, but if the things that they're telling me [are] true, and I've got E-mails that I've spread back and forth, some of them from [Benson] that were fairly condemning, and I said, you know, you have to decide what to do, but I'm going to deal with you and with Benson factually, and if-you know, I'm not going to say anything more if the program starts running correctly and if he backs off my people and doesn't demean them in public, et cetera, and doesn't tell

> what I would call lies, errors that he knows are not factually true, and so I don't know if I told him to get rid of him, to take him off the program, but it was close to that. He got where I was headed with it. I said you're the boss, but [these] are the facts, you investigate it.

Niedbaldski's statement clearly tells Mason that Niedbaldski cannot do anything about Benson because Benson does not work for him. He also said that the PMR briefing was critical and that if it did not meet his expectations, he would hold Mason responsible for Benson's nonproduction and inability to get along with AFSOC personnel. His statement that Mason, "got where I was headed with it," reveals that Niedbaldski gave Mason little choice if the PMR briefing did not work out. It did not. I credit Niedbaldski.

The clear inference to be drawn from his testimony is that Benson had become unsatisfactory as the program manager of the APQ-158 system, that Benson was having problems with AFSOC personnel or vice versa, was not supplying the factual information that Niedbaldski wanted and that he warned Mason that he was going to look very critically at the performance at the PMR. I also credit Niedbaldski that he glanced at Mason during Benson's presentation out of frustration. Given Niedbaldski's position as the customer, it is difficult not to interpret Niedbaldski's glances at Mason as an indication that he had seen enough of Benson as the APQ-158 program manager. It is, therefore, found that although Mason stopped the briefing, his action was at the directive of Niedbaldski.

Following this briefing, Benson considered himself fired from the program. Sometime later, Mason told Layfield to be personally responsible for the APQ-158 system until completion. Thus, Layfield assigned himself as the program manager for the APQ-158 system. I credit Layfield's interpretation of Mason's directive that he was to remove Benson from the program at the request of AFSOC and the behest of the director." Mason's testimony that his comments to Layfield could have been interpreted this way is consistent with that of Layfield. Based on the foregoing, it is found that there is no showing in this case that Benson was removed for the program manager position for the APQ-158 system because of his protected activity in LU.

C. The Bargaining Obligation

Bob Evans, the Directorate Union Stewards knew of Benson's removal as the APQ-158 program manager a few weeks

after it happened. Evans, however, made no demand to bargain over Benson's removal on behalf of the Union. In addition, Evans testified that Respondent has never consulted with him or the Union when moving a program manager to another program because he didn't think they had to do so. Evans said that program managers are moved from one program to another rarely, but the weight of the evidence shows otherwise.

General Counsel's witness, Williams testified to the contrary that the APQ-158 system, in particular, and others have had many different program managers and that their movement is commonplace. Furthermore, Benson testified that he works on many (25-30) programs. The record as a whole indicates that the Respondent's program managers do not work on one program at a time, but are fungible and have moved on and off programs with some regularity for years. In this regard, the record shows that this was not Benson's first time as APQ-158 program manager and that he previously left the program with no fanfare or bargaining. In fact, Benson was not certain whether when he first left the APQ-158 system in 1997, he had departed of his own volition or was fired. Benson's own testimony thus shows the informality with which these program manager positions are assigned and reassigned. Accordingly, it is concluded that program managers operate more than one program at a time and that they move back and forth between programs as part of Respondent's assignment of duties. Finally, it is found that despite program managers moving between different programs there has been no bargaining over the movement.

D. Benson's 1998 Performance Evaluation

In May, Benson was given his yearly performance appraisal. This appraisal covered the period April 1, 1997, to March 31, 1998, and rated Benson as Excellent. Benson's overall score was 75. Benson testified that Layfield asked him to return to the APQ-158 system after a short absence because, "he didn't have anybody else with the capability, he didn't have anybody else that could handle it, would I help him." Although Benson was reluctant to return to the APQ-158 system he offered Layfield a deal. Thus, Benson contends that when he first came to work for Layfield in January 1998[2] he had a conversation with Layfield concerning an 81 score. Benson testified as follows:

> I told [Layfield] . . . I'm getting rotten appraisals for the last couple

[2] Benson actually assumed that program manager's position sometime in mid-February 1998.

> years, I don't want that to happen this year. Wiggs is gone. I want us to put our union stuff separate from my work. I want to make sure that whatever the heck I need to do for you, I'll do. . . .

Benson admits that Layfield did not say "yes, I can promise you an 81 superior." Benson was fully aware that Layfield could not make such a promise. Benson says however, that Layfield did agree and commit to work with him, to counsel and to guide him in any manner to achieve the 81 score. Furthermore, Benson admits that although Layfield told him that he was doing a good job, Layfield did not counsel him formally one way or another. When Benson received his appraisal from Layfield he questioned why he had not received the 81. According to Benson, he told Layfield that he didn't understand the appraisal since he had come into the APQ-158 system and done everything that Layfield wanted.

Under their alleged agreement Benson obviously felt that he was entitled to an 81 even though this performance evaluation covered only a 2 ½ month period that he had worked with Layfield on the APQ-158 system as the program manager. Apparently, Layfield felt otherwise. When he asked why Layfield had not given him a good appraisal, Benson stated that Layfield responded, "Well [Mason] wouldn't let me, because of all that paperwork." According to Benson, the paperwork statement meant "all the union paperwork at the front office. . . ." Such a statement also, in my view, carries the implication that one cannot justify doing all the paperwork that is required to give a perfect score for an individual. I credit Layfield's testimony that he did not make such a statement and that Mason had no input at all in it. "All that paperwork" is a classic brush off serving multiple purposes for not rating employees higher. Furthermore, Benson says he, immediately identified areas such as his "tact and diplomacy" which might have prevented him from obtaining a perfect score. Benson's own assessment of his performance during the appraisal period in question raises questions as to whether he even thought it realistic to consider such a score for him. Even if Layfield made the remark attributed to him by Benson such a statement is not necessarily violative of the statute. Layfield could well have meant that an 81 perfect score requires "all that paperwork" to justify such a score and neither I nor Mason want to do that much paperwork to explain such a score for you.

Layfield credibly testified that he did not recall Benson asking him about an 81, but he also stated that everyone wants to be that high, leaving open the possibility that Benson did ask him. In any event, it strains credulity to think that a supervisor would offer an employee a perfect rating after that employee had worked for him only 2 ½ months and one half of the appraisal period. A perfect score in that situation would raise questions in my mind as to whether it was valid. Even assuming that Layfield made such a promise to Benson the evidence certainly does not lead one to conclude that Layfield intended to work with Benson on the perfect score for the appraisal period which ended March 1998.

The evidence also disclosed that Benson received the same numerical rating from Layfield that he received the previous two years as a program manager from different supervisors. Benson testified that the 75 numerical score which carried an excellent rating is no good because anything less than a perfect appraisal cannot be used to better one's career or receive any awards, is sheer speculation. Other than Benson's conjecture, there is no record evidence to establish that a 75 score would not entitle Benson to obtain other positions nor is there any indication that he could not receive awards without a higher score.

The question remains as to why Benson would expect, as he says Layfield to keep a promise, if it was made, to give him an 81 score. According to Benson, Layfield promised to work with me, guide me and help me in any manner to achieve the perfect score. Yet Benson's own testimony is that Layfield did not counsel him either formally or informally or help him any way to achieve that score. Thus, Layfield's failure to help Benson during this period is consistent with his not recalling the alleged promise to help Benson to obtain a better score. Even crediting Benson, Layfield simply did not keep his promise to help Benson in obtaining an 81, at least for that rating period. Furthermore, there is no showing that such a failure by Layfield was based on Benson's protected activity. In the circumstances of this case, it is found that Layfield had no reason to tell Benson that he could not give him a good score because of his protected activity.

E. The June 18 Meeting Between Mason and Union Representatives Bob Evans and Ronald Martin

On June 18, the Union asked to meet with Mason about the unfair labor practices in LU. At this meeting were Mason, Evans and Ronald Martin, a Union vice president who has

supervisory authority over all stewards. Martin decided not to invite Benson to the meeting because he didn't want a shouting match. Martin testified that, they discussed one unfair labor practice and then they got up to leave. Then according to Martin, Mason started to talk about Benson saying that he was the problem and that if he got rid of him, the unfair labor practices would go with him and that he Mason was doing everything right. Martin also says that Mason said he (Martin) should take Benson off the stewards' list and that he was considering disciplinary action against him for an E-mail and putting down LU in front of their customers. Evans says that unfair labor practices were not discussed at this meeting, only Benson. Supposedly, Mason said that Benson was filing too many unfair labor practices, was a rogue steward and should be removed from the stewards' list. He testified that Mason said he was preparing discipline against Benson because a meeting had not gone well and that as a result of that meeting Benson was being removed from the program that he was briefing.

Mason testified that the purpose of the June meeting was to discuss a specific unfair labor practice and the failure of the Union to follow the road block procedure before filing unfair labor practices. Mason says that both sides discussed the fact that Benson had filed a lot of unfair labor practices but denies that he made any suggestion that he move Benson to another Directorate or that Benson be removed from the steward list. He added that he could not unilaterally move Benson to another Directorate even if he wanted to. Masons' version of this meeting is credited. First, the Union called the meeting to admittedly discuss the unfair labor practices being filed in LU and, as previously shown, the great majority of these were filed by Benson. It is clear that they intended to talk about these unfair labor practices and, in particular, Benson, which appears to be the reason Benson was not invited.

Discussion and Conclusions of Law

A. Case No. AT-CA-80584

This case is controlled by the guidelines established in Letterkenny Army Depot, 35 FLRA 113 (1990) (Letterkenny). The criterion to be applied to cases alleging violations of section 7116(a)(2) as well as those alleging violations of section 7116(a)(4) is clearly set out in that case. Department of Veterans Affairs Medical Center, Brockton and West Roxbury, Massachusetts, 43 FLRA 780 (1991) (VAMC). Under Letterkenny, the General Counsel has to establish a prima facie case of discrimination, by showing that an employee was engaged in protected activity and, that the

protected activity was a motivating factor in his treatment.

Where a prima facie case is demonstrated, the respondent still has an opportunity to show a legitimate justification for its action and that it would have taken the same action even in the absence of protected activity. The burden of proof is with the General Counsel. Determining whether a prima facie case was established, the entire record should be reviewed. If the General Counsel makes the required prima facie showing, the Respondent may seek to establish, by a preponderance of the evidence, that there was a legitimate justification for its action and that the same action would have been taken even in the absence of the consideration of protected activity. If the General Counsel fails to make the required prima facie showing, the case ends without further inquiry. See also U.S. Department of Treasury, Internal Revenue Service, Washington, D.C., 41 FLRA 1212, 1213-14 (1991)(DOT, IRS).

In my view, the General Counsel did not make a prima facie case of discrimination under section 7116(a)(2) and (a)(4) of the Statute with regard to Benson's removal from the APQ-158 program manager's position. It was clearly shown that Benson was involved in protected activity when he filed numerous grievance and unfair labor practices. Furthermore, it was established that Benson testified in an unfair labor practice case before the Authority. Moreover, the record shows that there was considerable concern about Benson's participation in numerous protected endeavors.

The foremost issue here is whether Mason removed Benson from the APQ-158 system because of his protected activity in LU. Respondent contends, in essence, that Benson was not removed as program manager for the APQ-158 system because of his protected activity at LU, but that Benson was removed because AFSOC wanted him off the APQ-158 system and Mason therefore, had no choice but to remove him. The record persuades the undersigned that Benson was removed from the APQ-158 system and that the April 30 PMR briefing was a part of the reason for his removal. He was also removed, however, because in his dealings with AFSOC personnel prior to the PMR he angered one or more customers and the customers became determined to get rid of him. I hasten to add that Benson's vigorous pursuit of the requirements in the APQ-158 system was his responsibility. Thus, in reviewing the record it does not appear that Benson could have done anything else. Unfortunately for Benson, he angered someone outside the sweep of his protected activity and someone with the ability to have him removed from the program.

There is no doubt that AFSOC personnel successfully pushed for Benson's removal from the APQ-158 system. The uncontradicted testimony of Tusai and Niedbaldski revealed reports of nonproduction and inability to get along with AFSOC personnel. Even if AFSOC's complaints are meritless, they are relevant to the issue of whether Benson was removed as program manager of the APQ-158 system because of his protected activity.

Niedbaldski's testimony also reveals that he as the customer wanted Benson off the program and that although he could not relieve Benson of his duties, Manson could. The record is also undisputed that Niedbaldski then called Mason to discuss Benson's remaining on the APQ-158 system. This call signaled Benson's imminent departure from the APQ-158 system, in my view. Niedbaldski left no doubt that he had acted on the recommendation of Tusai and Major Zack when he talked to Mason prior to the PMR. The decision to remove Benson was thus made earlier than April 30, as Niedbaldski testified that he not only talked about the nonperformance but, warned Mason that he was going to look very critically at the [PMR] . . . and Mason "got where I was headed with it." Their conversation, prior to the PMR clearly reveals who had the authority to say who the program manager would be.

During the April 30 briefing, Benson apparently said among other things, that he did not know what the requirements were for the program suggesting, it was interpreted by Tusai, that this was the fault of AFSOC. Tusai, as noted was the AFSOC official responsible for this program and seeing that the requirements are set, became visibly upset by Benson's remarks. An argument ensued about whether or not the proper requirements have been made known to Benson so that he could do his job. The purpose of this briefing however, was simply to provide factual data to the six colonels who convened there. Benson admittedly provided "zero" new information at this briefing. Furthermore, the reaction of Tusai with his heretofore controlled anger no doubt generated an atmosphere at the PMR meeting which left some of the audience bewildered. This is not to say that Benson was in any measure responsible for the argument that ensued because of any statement made by him during the briefing. What is shown, however, is that Benson's presence created a climate that was unacceptable to the customer. There is little wonder that he was told before he went into the meeting that they were "waiting for him." The so-called ambush by an amorphous "they" as viewed by Benson, in my view had nothing to do with his protected activity in LU.

It is undisputed that Niedbaldski was concerned when Benson's briefing, instead of relaying facts showing progress on the program, became an open argument about requirements. In his displeasure Niedbaldski looked at Mason several times. In my opinion, Niedbaldski's glances at Mason spoke volumes. Keeping in mind the nature of the meeting and the fact that Mason needed to be "sensitive" to his customers concerns, it would be unrealistic to say that there was no justification for Benson's removal as the program manager for that particular project. AFSOC is LU's customer and, rightly or wrongly, this customer was displeased with Benson's comments. The evidence suggests that Mason also could not mistake the enmity of the customer, Tusai. In view of customer concern documented in the record and the breakdown in the briefing, it would not have been unreasonable, in my opinion, for Mason to submit to AFSOC opinion that Benson should no longer be responsible for this particular program.

Accordingly, it found that the General Counsel has not established any discriminatory motivation for the Respondent's removal of Benson from the APQ-158 program manager's position. Therefore, it is found that Respondent did not violate section 7116(a)(1), (2) and (4) of the Statute by removing Benson as program manager of the APQ-158 system.

Finally, it is asserted that Respondent's discriminatory motivation is demonstrated by its shifting reasons and inconsistencies in its witnesses recollection as to why Benson was removed from the APQ-158 system. While it may be evidence of discriminatory motive for management to change the asserted reasons for its actions in certain circumstances, I conclude that no such inference is justified in this case. Therefore, based on all of the evidence in this case and reasonable inferences drawn therefrom, I conclude that the General Counsel has failed to make a prima facie case that Respondent's removal of Benson from the APQ-158 program manager's position was motivated by Benson's protected activity. Accordingly, I find it unnecessary to consider whether the Respondent has established that it would have removed Benson from the APQ-158 program manager's position for legitimate reasons even if he had not engaged in extensive protected activity.

B. Case No. AT-CA-80672

The General Counsel alleges that Respondent violated section 7116(a)(1), (2) and (4) of the Statute by considering Benson's protected activity in his performance evaluation for the period ending March 31, 1998. Again as

with the previous allegations, the case is controlled by Letterkenny. The criteria to be applied to cases alleging violations of section 7116(a)(2) as well as those alleging violations of section 7116(a)(4) is clearly set out in that case. VAMC, 43 FLRA at 780. Under Letterkenny the General Counsel has to establish a prima facie case of discrimination, by showing that an employee was engaged in protected activity and, that the protected activity was a motivating factor in his treatment.

Where a prima facie case is established, the respondent still has an opportunity to show a legitimate justification for its action and that it would have taken the same action even in the absence of protected activity. The burden of proof is with the General Counsel. If the General Counsel makes this required prima facie showing, the Respondent may seek to establish by a preponderance of the evidence, that there was a legitimate justification for its action and that the same action would have been taken even in the absence of the consideration of protected activity. Id. If the General Counsel fails to make the required prima facie showing, the case ends without further inquiry. Id. See DOT, IRS, 41 FLRA at 1213-14.

In my view, the General Counsel did not demonstrate a prima facie case of discrimination under section 7116(a)(1), (2) and (a)(4) of the Statute in this matter. Although it was shown that Benson engaged in extensive protected activity and Respondent was aware of that activity, it was not shown, in my opinion that Benson's protected activity was a motivating factor in his 1998 performance appraisal. Determining whether a prima facie case was established, the entire record should be examined.

The General Counsel established that Benson was engaged in considerable protected activity and that Respondent was aware of that protected activity. This case is purely one of witness credibility. The record as a whole does not support a finding that Benson's protected activity was a motivating factor in his 1998 evaluation. Thus, a prima facie case has not been established.

It is worthy to note, that when Benson returned to the APQ-158 system it was he, not Layfield who introduced the subject of performance evaluations being separated from his union activity. At that point, Layfield had apparently never evaluated Benson, so it is difficult to understand why Benson would raise this issue, unless he wanted to create a connection between his previous two evaluations which were rated 75 and excellent, and his protected activity. Layfield does not recall such a conversation nor does he

recall promising Benson that he would aid him in getting the perfect score of 81. Benson says that Layfield promised to aid him in getting the 81, but the record clearly shows that Layfield did not help Benson obtain such a score. The General Counsels asserts, in essence, that because Layfield did not counsel Benson about his performance one way or another, it should be assumed that a less than perfect score was based on Benson's protected activity. I cannot agree, since it seems to me that if Layfield did nothing to help Benson obtain a perfect score of 81, it was because Layfield had not promised to do anything. Thus, I credit Layfield that he did not recall that conversation with Benson.

I also credit Layfield, that Mason had no input into Benson's 1998 performance evaluation. Furthermore, I credit Layfield that he discussed Benson's performance appraisal and while Benson raised a question about the score of 81 with him, Layfield says that everyone asks about the perfect score, but there are few perfect employees, and he had no recollection of such a conversation. If Layfield is credited, Benson's assertion that Layfield told him Mason would not let him give Benson the perfect score because of all the "union paper work," must be rejected." In examining the record as a whole, and noting Benson's voiced suspicion in his testimony that even his previous two performance evaluations were tainted because of his protected activity, I simply cannot credit Benson on this point. Thus, I am unable to find any linkeage between Benson's score of 75 and his protected activity. Therefore, I find it unnecessary to consider whether Respondent had to prove that it would have given Benson the same score even if he had not engaged in protected activities.

Accordingly, it is found that the General Counsel has not shown that Respondent considered Benson's protected activity in his performance evaluation for the period ending March 31. Consequently, it is found that Respondent did not violate section 7116(a)(1), (2) and (4) of the Statute by making Benson's protected activity a motivating factor in his 1998 performance appraisal. Further, it is found that Layfield's alleged comments did not constitute a separate violation of 7116(a)(1) of the Statute.

C. Case No. AT-CA-80670

The General Counsel alleges that Respondent violated section 7116(a)(1) and (5) of the Statute by removing Benson as program manager of the APQ-158 system without providing the Union with notice and an opportunity to bargain over the change. The Authority recently reaffirmed the principle that where an agency exercises a management right under

section 7106 and changes a condition of employment of unit employees, a statutory obligation to bargain arises over the implementation procedures and appropriate arrangements for impacted employees when the impact is more than de minimis. U.S. Department of Justice, Federal Bureau of Prisons, United States Penitentiary, Leavenworth, Kansas and AFGE, Local 919, 53 FLRA 165, 169 (1997); See, U.S. Department of the Treasury, Customs Service, New Orleans, Louisiana and NTEU, Chapter 168, 38 FLRA 163, 174 (1990); Department of Transportation, Federal Aviation Administration, 19 FLRA 472, 476 (1985). The facts regarding this allegation are not in dispute.

The removal of Benson from the APQ-158 system constituted no more than an assignment of work and a determination by Respondent as to who would carry out its operations. This decision falls within the context of management rights found in section 7106 of the Statute. The question thus becomes whether the reassignment had a more than a de minimis adverse impact on Benson. On the record as a whole there does not appear that there was any impact in this case. The record clearly shows that programs managers are fungible. The record testimony is that it is not uncommon for program managers to be moved from program to program. Furthermore, although not routine, program managers from time to time are without assignment. Moreover, Benson remained a program manager in LU after his removal from the APQ-158 system. Benson's work was unchanged and his performance evaluation was also consistent with the rating he received in the two previous years. Movement from program to program is confirmed by Benson who in November 1997 left the APQ-158 system, apparently on less than ideal terms, only to return in February 1998 to "rescue" the program without any discernible impact. Furthermore, it appears that program managers do not work on a single program at a time. No only that, the record shows Benson has been in and out of other programs voluntarily and involuntarily with no change in his working conditions.

It does not appear from the record that program manager ceases to be a program manager even when a program is lost or terminated, therefore, they are still program managers no matter whether they are reassigned or not. In the circumstances of this case, based on the evidence that Benson has moved in and out of the programs without bargaining it is my opinion that reassignment of a program manager from a program such as the APQ-158 system has little

or no foreseeable adverse impact on the program manager.[3] Accordingly, it is found that Respondent did not have an obligation to bargain over Benson's removal as program manager of the APQ-158 system under current Authority law since the impact on Benson was de minimis.

D. Case No. AT-CA-80734

This part of the consolidated complaint alleges that Respondent violated the Statute when Mason told Evans and Martin that Benson should be taken off the stewards' list because of his protected activity and that if he could get rid of him all of the unfair labor practices would disappear. It is also alleged that Mason said he was going to take disciplinary action against Benson for filing unfair labor practices and grievances. The testimony of both Evans and Martin is that Mason said he was considering discipline against Benson because of the April 30 briefing and an E-mail.

It does not however, establish that Mason was motivated by Benson's protected activity. The June meeting with the Union was called to resolve unfair labor practice issues, a goal of the parties' roadblock procedure. As this is a negotiated procedure, it appears that the reduction of unfair labor practice charges is a worthy goal that each side should have been interested in achieving. The General Counsel asserts that the mention of Benson with regard to the number of charges and the request that the Union remove him as steward is coercive since the clear inference is that Mason was trying to control the Union's right to choose its own representatives. Further, the General Counsel maintains that such a statement could have persuaded the Union to get rid of Benson and the sides would "get along" better. Assuming that Mason said such words, they would constitute nothing more than an expression of his personal opinion about Benson that was given in a non-coercive setting. As such, they would not rise to the level of a violation of the Statute. See, Department of the Air Force, Air Force Logistics Command, Ogden Air Logistics Center, Hill Air Force Base, Utah, 10 FLRA 88 (1982). Though Martin says that Mason brought up the subject of Benson, the evidence indisputably shows that Martin scheduled the meeting with Mason to discuss unfair labor practices in LU, which is tantamount to saying Benson.

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[3] Based on the foregoing, it is unnecessary to decide whether embarrassment or humiliation constitute a reasonably foreseeable adverse impact.

One cannot reasonably separate "unfair labor practices in LU" from Benson because as the record reveals he filed most of those charges. Thus, when Martin came to talk to Mason he was there at least, in part, to talk about Benson. For that reason, Benson was not invited, at Martin's discretion. Given this fact, and the fact Martin agrees that there were too many unfair labor practices being filed in LU and many were "frivolous," it could be inferred that he not Mason put Benson on the table for discussion. Accordingly, if Mason expressed his opinion that Benson should be fired from the stewards' list (which Martin alone could do) and that if he left LU the unfair labor practices would follow, such statements would not have been coercive in the circumstances of this meeting. At most, Mason was responding to comments that Union officials were making about Benson who was lower in rank, in the Union hierarchy. I find that no threats were made in this meeting and Mason's words (as attributed by Martin and Evans) were not coercive in an objective sense.

Accordingly, I find that the Respondent did not violate section 7116(a)(1) of the Statute through statements allegedly made by Mason at the June 18 meeting.

Based on all of the foregoing, it is recommended that the Consolidated Complaint in Cases Nos. AT-CA-80670, AT-CA-80672, AT-CA-80734 and AT-CA-80584 be, and they hereby are, dismissed in their entirety.

Issued, Washington, DC, March 18, 1999.

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ELI NASH, JR.
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of this **DECISION** issued by ELI NASH, JR., Administrative Law Judge, in Case Nos. AT-CA-80670, 80672, 80734 & 80585, were sent to the following parties:

CERTIFIED MAIL & RETURN RECEIPT	**CERTIFIED NOS:**
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CATHERINE L. TURNER, LEGAL TECHNICIAN

DATED: MARCH 18, 1999
WASHINGTON, DC